A **MAA BINDA EXPRESS CARRIER AND ANOTHER**

v.

NORTH-EAST FRONTIER RAILWAY AND OTHERS

B SUPREME COURT, INDIA
(2014) 3 SUPREME COURT CASES 760
TS THAKUR J
VIKRAMAJIT SEN J
[CIVIL APPEAL NO: 10751 OF 2013†]
C 29 NOVEMBER 2013

CONTRACT: *Government Contracts/Tenders - Auction/Bidding/Tender Process/Rejection of Bid/Tender - Tender process - Cancellation/discharge of tender process, after submission of bids/tenders, in response to deficiency* D *in tender process - Scope of powers of Government/Competent authority - Scope of judicial review thereof - Held, submission of a bid/tender in response to a notice inviting tenders is only an offer which State or its agencies are under no obligation to accept - Bidders participating in the tender process cannot insist that their bids/tenders should be accepted* E *simply because a bid is the highest or lowest - All that participating bidders are entitled to is a fair, equal and non discriminatory treatment in evaluation of their bids/tenders - Hence, decision to cancel the tender process was in no way discriminatory or mala fide nor violated any fundamental right of appellants so as to warrant any interference by* F *Court - Hence, appeal dismissed with costs assessed at Rs 25,000 - Constitution of India, Arts. 14, 298, 299, 226 and 136*

CONTRACT: *Government Contracts/Tenders - Auction/Bidding/Tender Process/ Rejection of Bid/Tender - Tender process - Rights of participating bidders - Contractual transactions of Government - Norms for - Held, in* G *award of contracts Government and its agencies have to act reasonably and fairly at all points of time - To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against - Constitution of India, Arts. 14, 298, 299, 226 and 136*
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I † Arising out of SLP (C) No. 18405 of 2012. From the Judgment and Order dated 6-6-2012 of the High Court of Guwahati, Assam in WA No. 79 of 2012

Dismissing the appeal, the Supreme Court

Held:

While it is clearly recognised that the power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process. In the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (Paras 8 and 9)

Meerut Development Authority v. Assn. of Management Studies, (2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803
Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617
Tata Cellular v. Union of India, (1994) 6 SCC 651
Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517
Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216
Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492, followed

A *North Eastern Frontier Railways v. Maa Binda Express Carrier*, Writ Appeal No. 79 of 2012, order dated 6-6-2012 (Gau), affirmed
Maa Binda Express Carrier v. Union of India, WP (C) No. 4668 of 2011, order dated 4 2 2012 (Gau), reversed

B-D/52630/C

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Advocates who appeared in this case:
For the appellants - Dr Abhishek Manu Singhvi, Senior Advocate (C Mukund, Priyankar Saha, Ms Ekta Bhasin, Pankaj Sain, Amit Bhandari, Ms Charul Sarin and Bijoy Kr Jain, Advocates)
C *For the respondents - RP Bhatt, Senior Advocate (AK Srivastava, Vikas Malhotra, P Agrawala, Rajat Mathur and Shreekant N Terdal, Advocates)*

Chronological list of cases cited on
Michigan Rubber (India) Ltd. v. State of Karnataka (2012) 8 SCC 216
D *North Eastern Frontier Railways v. Maa Binda Express Carrier Writ Appeal No. 79 of 2012, order dated 6-6-2012 (Gau)*
Maa Binda Express Carrier v. Union of India WP (C) No. 4668 of 2011, order dated 4-2-2012 (Gau) (reversed)
Meerut Development Authority v. Assn of Management Studies (2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803
E *Jagdish Mandal v. State of Orissa (2007) 14 SCC 517*
Air India Ltd. v. Cochin International Airport Ltd (2000) 2 SCC 617
Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492
Tata Cellular v. Union of India (1994) 6 SCC 651

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JUDGMENT

TS Thakur J:

[1] Leave granted. This appeal arises out of a judgment and order dated 6-6-2012[1] passed by a Division Bench of the Gauhati G High Court whereby Writ Appeal (C) No. 79 of 2012 has been allowed; judgment and order dated 4-2-2012[2] passed by a Single Bench of that Court set aside and Writ Petition (C) No. 4668 of 2011 filed by the appellants dismissed.

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1. *North Eastern Frontier Railways v. Maa Binda Express Carrier*, Writ Appeal No. 79 of 2012, order dated 6-6-2012 (Gau)
I 2. *Maa Binda Express Carrier v. Union of India*, WP (C) No. 4668 of 2011, order dated 4-2-2012 (Gau)

[2] In terms of a notice dated 12-7-2011 the Divisional Commercial Manager, Tinsukia invited tenders for the grant of a three year lease of 23 tonnes of space in VPH (Parcel Van) on Train No. 15960/15959 Kamrup Express. Amongst those who responded to the tender notice was the appellant herein who offered a sum of Rs 1,46,872 per trip for the proposed lease. The tender process was discharged by the railway administration on account of technical and administrative reasons no matter the appellant's offer was the highest. A communication dated 6-9-2011, addressed to the appellant was in that regard issued to the appellant who assailed the same in WP (C) No. 4668 of 2011 before the High Court of Gauhati.

[3] In their counter-affidavit the Railways defended the cancellation/ discharge of the tender not only on the ground that the appellant had acquired no vested right for allotment of the contract in its favour merely because its bid was found to be the highest, but also on the ground that the power to cancel/ withdraw the tender notice had been specifically reserved by the railway administration in its favour. That apart, the cancellation of the tender process was sought to be justified also on the ground that the railway administration had discovered a serious deficiency in the same inasmuch as the tender forms had been issued without enclosing therewith the terms and conditions subject to which the contract could be allotted or awarded. It was also contended that an all important penalty clause had not been incorporated in the tender documents. These omissions and deficiencies were according to the respondent sufficient for cancellation of the tender process to be followed by a fresh process in due course.

[4] A learned Single Judge of the High Court of Gauhati before whom the matter was argued took the view that the discharge of the tender process had caused prejudice to the appellant by reason of his rates having become public. It was also held by the learned Single Judge that every public authority was required to act fairly while granting contracts and that reasons for cancellation of the tender process should have been set out in the communication sent to the appellant instead of being disclosed subsequently in the affidavit filed in opposition to the writ petition. The learned Single Judge of the High Court accordingly allowed the writ petition with a direction that so long as the appellant

undertook to accept the penalty clause as a part of the contract between the parties, the railway administration would consider its bid for acceptance and resultant allotment of the contract within 15 days of receipt of the undertaking.

[5] Aggrieved by the judgment and order[2] abovementioned, the railway administration preferred Writ Appeal (C) No. 79 of 2012 before the Division Bench of the High Court of Gauhati. Relying upon the decision of this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd.*[3] the Division Bench held that the appellant acquired no right to claim the award of the contract merely by reason of its bid being the highest. It further held that the scope of judicial review being limited in tender matters, the court had to restrain itself from interfering with the process so long as the decision of the competent authority was not against public interest, irrational, *mala fide* or illegal. It was also held that merely because the order discharging tender process was silent as to the reasons for the decision the same did not prevent the court from looking into the records to find out the basis on which the cancellation was ordered. So also the argument that exposure of rates offered by the appellant would result in prejudice to the appellant was rejected as a ground to justify interference with the decision of the railway administration which was otherwise held to be legal and *bona fide*. The present appeal assails the said decision as seen earlier.

[6] We have heard the learned counsel for the parties at some length. The material facts are not in dispute. It is not in dispute that tender documents were not accompanied by the terms and conditions applicable to the proposed contract. That being so, award of a contract without specifying the terms subject to which the same had to be worked was bound to result in serious administrative and legal complications. It is also not in dispute that no Tender Box Opening Committee had been nominated with the approval of the Controlling Officer nor was any verification of tender documents conducted by the Division concerned for their genuineness. The absence of a penalty clause from the tender

2. *Maa Binda Express Carrier v. Union of India*, WP (C) No. 4668 of 2011, order dated 4-2-2012 (Gau)
3. (1999) 1 SCC 492

documents was similarly a serious deficiency in the entire tender process. Cancellation of the tender process could not, in that view, be said to be *mala fide* to call for interference by the High Court.

[7] The respondents have, in their written submissions filed before us, referred to Circular No. 12 of 2006 by which guidelines for leasing out existing space in trains for the purposes of operating parcel services have been issued. These guidelines, *inter alia*, stipulate that a Tender Committee shall be put together which requirement was also not complied with while issuing the tender notice in the instant case. That apart, the Ministry of Railways has, by Circular No. 13 dated 31-5-2012, revised the rate structure for booking of parcel and luggage services. The revised rate for Kamrup Express is Rs 4756 per ton. The reserve price calculated on that basis comes to Rs 1,84,100. The offer made by the appellant was much below that amount. Besides, a market survey conducted in terms of an interim order passed by the High Court had revealed that the contract could fetch Rs 2,25,000 per trip which was substantially higher than Rs 1,46,872 quoted by the appellant. Suffice it to say that not only is the reserve price applicable as on date higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the Railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand.

[8] The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be

A accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their
B tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that
C the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

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[9] Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the
E aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn. of Management Studies*[4] *and Air India Ltd. v. Cochin International Airport Ltd.*[5])

F **[10]** The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India*[6], *Raunaq International Ltd.* case[3] and in *Jagdish Mandal v. State of Orissa*[7] besides several other decisions to which we need not refer.

[11] In *Michigan Rubber (India) Ltd. v. State of Karnataka*[8] the
G legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p. 229, paras 23-24)

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4. (2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803
5. (2000) 2 SCC 617 : (2000) 1 SCR 505
6. (1994) 6 SCC 651
I 3. *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492
7. (2007) 14 SCC 517
8. (2012) 8 SCC 216

23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) *fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable*. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) *if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.*

[20] Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) *Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'? and*

A (ii) *Whether the public interest is affected?*

If the answers to the above questions are in the negative, then there should be no interference under Article 226. (emphasis supplied)

[12] As pointed out in the earlier part of this order, the decision B to cancel the tender process was in no way discriminatory or *mala fide*. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. Inasmuch as the competent authority decided C to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order[2] passed by the Single D Judge and dismissing the writ petition.

[13] In the result, this appeal fails and is hereby dismissed with costs assessed at Rs 25,000.

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2. *Maa Binda Express Carrier v. Union of India*, WP (C) No. 4668 of F 2011, order dated 4-2-2012 (Gau)

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